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Settlement of commercial disputes

Interim measures

Note by the Secretariat

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be enforceability of interim measures of protection.[1]

2. The Working Group considered the possible preparation of harmonized texts on interim measures at its thirty-second (Vienna, 20-31 March 2000),[2] thirty-third (Vienna, 20 November-1 December 2000),[3] thirty-fourth (New York, 21 May-1 June 2001),[4] thirty-sixth (New York, 4-8 March 2002),[5] thirty-seventh (Vienna, 7-11 October 2002),[6] thirty-eighth (New York, 12-16 May 2003),[7] thirty-ninth (Vienna, 10-14 November 2003),[8] fortieth (New York, 23-27 February 2004),[9] forty-first (Vienna, 13-17 September 2004),[10] forty-second (New York, 10-14 January 2005),[11] forty-third (Vienna, 3-7 October 2005)[12] and forty-fourth (New York, 23-27 January 2006)[13] sessions.

3. At its forty-fourth session, the Working Group agreed that the legislative provisions on interim measures and preliminary orders be placed in a new chapter, numbered chapter IV bis of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law").[14]

I. Draft legislative provisions on interim measures and preliminary orders

4. The text of chapter IV bis on interim measures and preliminary orders, as adopted by the Working Group at its forty-fourth session,[15] reads as follows:

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 bis—Conditions for granting interim measures

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

Article 17 quater—Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4—Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 decies—Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

* The conditions set forth in article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

II. Remarks on the draft legislative provisions on interim measures and preliminary orders

Remarks on section 1—Interim measures

Article 17, paragraph (2)

Form of issuance of an interim measure

5. At its thirty-sixth (New York, 4-8 March 2002),[16] thirty-seventh (Vienna, 7-11 October 2002)[17] and fortieth (New York, 23-27 February 2004)[18] sessions, the Working Group considered at length the form in which an interim measure should be issued by an arbitral tribunal. The Working Group agreed that the phrase "whether in the form of an award or in another form", which was inspired from the UNCITRAL Arbitration Rules, was sufficiently neutral to reflect the intention of the Working Group not to create any preferred form in which an interim measure should be issued. It was said that it would be undesirable for the draft paragraph to be overly prescriptive in respect of the form that an interim measure should take. The Commission might wish to note the suggestion that any explanatory material to be prepared, possibly in the form of a guide to enactment and use of the new legislative provisions, make it clear that the wording adopted should not be misinterpreted as taking a stand in respect of the issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention (see below, para. 17).[19]

Exhaustive nature of the list of functions characteristic of interim measures

6. At its thirty-sixth (New York, 4-8 March 2002)[20] and thirty-ninth (Vienna, 10-14 November 2003)[21] sessions, the Working Group considered whether all possible grounds for which an interim measure might need to be granted were covered by the current formulation under article 17, paragraph (2). After discussion, the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), the list could be expressed as an exhaustive one.[22] The Commission might wish to note the decision of the Working Group to provide explanation on that matter in any explanatory material accompanying that provision.

Article 17 bis

7. At its forty-third session (Vienna, 3-7 October 2003), the Working Group agreed to retain the word "adequately" in subparagraph (a) of article 17 bis (1) and to clarify, in any explanatory material, that the subparagraph should be interpreted in a flexible manner by balancing the degree of harm suffered by the applicant if the interim measure was not granted against the degree of harm suffered by the party opposing the measure if that measure was granted.[23]

8. It was suggested as well that explanatory material accompanying article 17 bis could indicate that the fact that the requirements in paragraphs (1)(a) and (b) of article 17 bis only applied to the type of measure contained in paragraph (2)(d) of article 17 to the extent the arbitral tribunal considered appropriate did not mean that an arbitral tribunal would not examine and weigh the circumstances in determining the appropriateness of ordering the measure.[24]

"Urgent need for the measure"

9. The Working Group considered, after discussion, that the need for urgency should not be a general feature of interim measures.[25] The Commission might wish to decide whether guidance should be provided in explanatory material indicating how urgency impacts upon the operation of the provisions in Section 1.

Remarks on section 2—Preliminary orders

General remarks

10. At its forty-first (Vienna, 13-17 September 2004),[26] and forty-second (New York, 10-14 January 2005)[27] sessions, the Working Group undertook a detailed review of the provisions regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis. In the legislative provisions, the term "preliminary order" is used, instead of "interim measure", to describe a measure issued on an ex parte basis. This term emphasizes the temporary and extraordinary nature of the order, as well as its distinct scope and purpose.

11. At its forty-second session (New York, 10-14 January 2005), after extended discussion, the Working Group agreed to include a compromise text of the provisions on preliminary orders, on the basis of the principles that: those provisions would apply unless otherwise agreed by the parties; it be made clear that preliminary orders had the nature of procedural orders and not of awards; and no enforcement procedure would be provided for such orders in section 4.[28]

Article 17 ter

Purpose, function and legal regime of preliminary orders

12. At the forty-first session of the Working Group (Vienna, 13-17 September 2004), doubts were expressed as to whether or not the notion of "preliminary order" should be regarded as a subset of the broader notion of "interim measure". It was suggested that, if a preliminary order was understood to be a subset of an interim measure, then the distinction between them might be regarded as artificial and might lead to difficulties in implementation and practice.[29] The Working Group noted that, although a preliminary order might be regarded as a subset of an interim measure, it should be distinguished from an interim measure in view of its narrower purpose, which was limited to preventing the frustration of the specific interim measure being applied for. Another distinctive feature of a preliminary order was that it was subject to strict time limits as set out in article 17 quater. It was stated that a preliminary order was effectively to provide a "bridging device" until an inter partes hearing could take place in respect of the requested interim measure.[30] The Commission might wish to decide whether explanatory material accompanying article 17 ter should include an explanation of the distinction between an interim measure and a preliminary order.

13. At the forty-second session of the Working Group (New York, 10-14 January 2005), it was said that article 17 ter could be misunderstood as providing that the arbitral tribunal could only direct the parties in general terms not to frustrate the purpose of the interim measure. Notwithstanding that view, it was understood that the arbitral tribunal had a more general discretion to issue a preliminary order that was appropriate and was in keeping with the circumstances of the case and that such an understanding should be made clear in any explanatory material.[31]

Article 17 quater

Obligation of arbitral tribunal to give notice (article 17 quater, paragraph (1))

14. At the forty-second session of the Working Group (New York, 10-14 January 2005), it was noted that the arbitral tribunal had an obligation to communicate documents and information to the party against whom the preliminary order was sought and it was suggested that it be clarified that that obligation applied whether the arbitral tribunal issued or refused to issue the order. The Commission might wish to note that the Working Group agreed that clarification of that obligation might be included in any explanatory material accompanying article 17 quater.[32]

Non-enforceability of preliminary orders (article 17 quater, paragraph (5))

15. The Working Group considered at length whether an enforcement regime should be provided in respect of preliminary orders. The need for including such a regime was questioned given the temporary nature of a preliminary order[33] and the fact that it could raise practical difficulties, such as whether notification to the other party of the preliminary order should be deferred until after the order had been enforced by a court.[34] The Commission might wish to note that non-enforceability of preliminary orders was central to the compromise reached at the forty-second session of the Working Group (see above, paragraph 11).

Recourse to courts

16. The Commission might wish to consider a proposal made at the forty-fourth session of the Working Group (New York, 23-27 January 2006) to add the following text to paragraph (5) of article 17 quater: "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal". The Working Group took note of that proposal. It was suggested that this proposal merely clarified the operation of the provision and did not seek to reopen substantive questions relating thereto.[35]

Remarks on section 4—Recognition and enforcement of interim measures

Interplay between section 4 and articles 35 and 36

17. Article 17 decies, which deals with the grounds for refusing recognition and enforcement of interim measures, refers to article 36, paragraph (1), of the Arbitration Model Law which is expressed to apply to awards. It is recalled that the Working Group decided not to define the form in which an interim measure should be issued (see above, para. 5), and the purpose of article 17 decies is to define the grounds for non-enforcement of interim measures, whether issued in the form of an award or in another form. The Commission might wish to consider whether it is necessary to clarify that the reference in article 17 decies to article 36, paragraph (1) should be understood as a reference to the grounds for non-enforcement, regardless of the form of issuance of the interim measure.[36]

Article 17 decies, paragraph 1

Burden of proof

18. In contrast to article 36, paragraph (1)(a), of the Arbitration Model Law which places the burden of proof on the party against whom the award is invoked, article 17 decies, paragraph (1)(a) reflects the decision of the Working Group that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable law.[37] The Commission might wish to note the decision of the Working Group to provide explanation on that matter in any explanatory material accompanying that provision.

"modified, terminated or suspended"

19. The Commission might wish to note that the Working Group agreed that any explanatory material accompanying article 17 decies should clarify that the enforcement regime set out in section 4 applied in respect of any interim measure, whether or not it was modified by the arbitral tribunal.[38]

Interplay between article 17 decies, paragraph (1)(a)(iii) and article 34

20. The Commission might wish to decide whether clarification is needed on the issue of whether an interim measure issued in the form of an award could be set aside under article 34 of the Arbitration Model Law. It is recalled that that question was raised at the fortieth session of the Working Group (New York, 23-27 February 2004) in the context of a discussion on whether the effect of article 17 decies, paragraph (1)(a)(iii) would be to allow a State court to set aside an interim measure issued by an arbitral tribunal. The Working Group agreed that article 17 decies,

paragraph (1)(a)(iii) should not be misinterpreted as creating a ground for State courts to set aside an interim measure issued by an arbitral tribunal.[39]

Article 17 decies, paragraph 2

21. The Commission might wish to recall that concerns were expressed in the Working Group that, when a court was called upon to enforce an interim measure, under article 17 decies, paragraph (1)(a)(i) (which refers to the grounds set forth in article 36, paragraphs (1)(a)(i), (ii), (iii) or (iv)), its decision could have an effect beyond the limited sphere of recognition and enforcement of the interim measure and, for example, impact on the recognition and enforcement of the arbitral award that determines the merits of the case. The purpose of article 17 decies, paragraph (2) is to confine the power of a court to the determination of recognition and enforcement of the interim measure only.[40]

Remarks on section 5—Court-ordered interim measures

Article 17 undecies

Placement of article 17 undecies

22. The Commission might wish to note that the Working Group considered whether article 17 undecies should be located in another part of the Arbitration Model Law given that it deals with court-ordered interim measures which might not easily fit into a chapter intended to deal mostly with interim measures granted by arbitral tribunals. The Working Group agreed that a text suggesting that States place article 17 undecies in the most appropriate part of their enacting legislation[41] could be included in explanatory material accompanying that provision along the lines of the text suggested in the note by the Secretariat.[42]

III. Amendment to article 1, paragraph (2), of the Arbitration Model Law

23. At its forty-third session (Vienna, 3-7 October 2005), the Working Group noted that, given the intention that the provision on court-ordered interim measures should apply irrespective of the State where the arbitration took place, that provision should be added to the list of articles contained under article 1, paragraph (2), of the Arbitration Model Law. That article provides that, in respect of the listed articles, the Arbitration Model Law, as enacted in a given State, applies even if the place of the arbitration is not in the territory of that State.[43] It was also suggested that a reference to articles 17 novies and 17 decies (which deal with recognition and enforcement of interim measures and the grounds for refusal thereof, respectively) should be included within the list of excepted articles so that article 1, paragraph (2), of the Arbitration Model Law would read as follows:

> "(2) The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State."

IV. Explanatory material

24. The Commission might wish to discuss the decision of the Working Group that explanatory material in relation to the legislative provisions on interim measures and preliminary orders could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraph 26 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on interim measures and preliminary orders to enacting States in a guide to enactment and use of the revised provisions.[44]

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 371-373 and para. 380.

[2] A/CN.9/468, paras. 60-87.

[3] A/CN.9/485, paras. 78-106.

[4] A/CN.9/487, paras. 64-87.

[5] A/CN.9/508, paras. 51-94.

[6] A/CN.9/523, paras. 15-80.

[7] A/CN.9/524, paras. 15-78.

[8] A/CN.9/545, paras. 19-112.

[9] A/CN.9/547, paras. 12-116.

[10] A/CN.9/569, paras. 12-68.

[11] A/CN.9/573, paras. 11-95.

[12] A/CN.9/589, paras. 11-107.

[13] A/CN.9/592, paras. 12-45 and annex I.

[14] Ibid., para. 14.

[15] Ibid., paras. 12-45 and annex I.

[16] A/CN.9/508, paras. 65-68.

[17] A/CN.9/523, para. 36.

[18] A/CN.9/547, paras. 70-72.

[19] Ibid.

[20] A/CN.9/508, para. 71.

[21] A/CN.9/545, para. 21.

[22] Ibid.

[23] A/CN.9/589, para. 37.

[24] Ibid., para. 33.

[25] A/CN.9/523, para. 41.

[26] A/CN.9/569.

[27] A/CN.9/573.

[28] Ibid., para. 27.

[29] A/CN.9/569, para. 24.

[30] Ibid., para. 26.

[31] A/CN.9/573, para. 30.

[32] Ibid., para. 41.

[33] A/CN.9/547, para. 66.

[34] A/CN.9/569, paras. 46-51.

[35] A/CN.9/592, para. 27.

[36] A/CN.9/547, para. 43.

[37] Ibid., paras. 35-36, 42, 58 and 60; A/CN.9/573, para. 73.

[38] A/CN.9/589, para. 85.

[39] A/CN.9/547, para. 26.

[40] Ibid., para. 24.

[41] A/CN.9/592, paras. 40-42.

[42] A/CN.9/WG.II/WP.141, para. 13. The footnote reads as follows: "In enacting article 17 undecies, States might wish to consider grouping this provision with other provisions in the enacting legislation relating to certain functions of arbitration assistance and supervision performed by courts or other authority."

[43] A/CN.9/589, paras. 101-103.

[44] A/CN.9/592, para. 81.